

WC 08-55

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
Kansas Corporation Commission's)
Petition for Declaratory Ruling Affirming the)
Lawfulness of Its USF Certification Procedure)
_____)

WC Docket No. ____

KANSAS CORPORATION COMMISSION'S PETITION FOR DECLARATORY
RULING

ATTACHMENT III

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners: Thomas E. Wright, Chairman
 Robert E. Krehbiel
 Michael C. Moffet

In the Matter of a Review of the Commission's Federal)
USF Certification Requirement to Remove All)
Expenses and Investments by Competitive Eligible)
Telecommunications Carriers in a Southwestern Bell)
Telephone, L.P., Study Area from the Competitive)
Eligible Telecommunications Carrier's Justification of)
Use of High Cost Federal USF Support.)

Docket No. 07-GIMT-498-GIT

ORDER

The above matter comes before the State Corporation Commission of the State of Kansas (Commission). Being fully advised of all matters of record, the Commission finds and concludes as follows:

1. The Commission opened this generic docket to consider whether to modify its prior decision regarding annual certification of eligible telecommunications carriers (ETCs) under the Federal Telecommunications Act of 1996 (Federal Act or Act). 47 U.S.C. § 214(e). Annually, this Commission must certify that an eligible telecommunications carrier (ETC) in Kansas has used all federal high-cost support received from the federal universal service fund "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 C.F.R. §§ 54.313(a), 54.314(a). Southwestern Bell Telephone Company, f/n/a Southwestern Bell Telephone, L.P., d/b/a AT&T Kansas (SWBT), is considered a non-rural carrier, 47 U.S.C. § 153, and, under the federal high-cost mechanism, is not eligible to receive federal high-cost support. 47 C.F.R. § 54.309.

2. Previously this Commission held that all competitive eligible telecommunications carriers (CETCs) must provide information to establish FUSF support has been spent in supported areas to provide universal service. KCC Docket No. 05-GIMT-112-GIT (Docket 05-112), Order, issued July 21, 2005 (July 21, 2005 Order), ¶ 9. Because SWBT does not receive high-cost loop support for which certification is necessary, SWBT's service areas are not supported areas. Due to this limitation, the Commission held that CETCs cannot rely on expenditures and investments made in SWBT service areas to justify certification of the CETC's expenditures and investments of federal high-cost support, except to the extent CETCs can allocate expenses and investments to specific supported areas under the USF Certification Instructions for Cost Reports, pp 4-5. Docket 05-112, Order Accepting Staff Report on USF Certification Process and Scheduling Comments, issued April 13, 2005 (April 13, 2005 Order), USF Instructions, Attachment 5 to Staff's Report, pp 4-5 (USF Instructions, 4-5). Recognizing CETCs may serve exchanges that are USF supported as well as areas that are not USF supported, the USF Instructions state several methods can be used to demonstrate allocations and provides examples that will normally be accepted for allocating UFS support. USF Instructions, 4-5. For example, to allocate costs for a cellular tower, a CETC may demonstrate the geographic area in the supported area versus the total area served by the tower. USF Instructions, 4, Example # 3.

3. Based upon its review of briefs submitted by the parties, evidence presented in prefiled testimony and during the hearing on June 4, 2007, and decisions by the Federal Communications Commission (FCC) discussing FUSF support, the Commission declines to revise its prior decision that refused to certify CETCs' expenditures and investments in non-supported areas, except to the extent CETCs can establish their allocation to supported areas. Instead, the Commission will follow its previous decision adopted in Docket 05-112, which certificated a CETC's expenditures and investments in supported areas of its territory and a

CETC's expenditures and investments in a non-supported area to the extent the CETC can demonstrate the investment should be allocated for serving its customers in a supported area.. July 21, 2005 Order, ¶ 9, and USF Instructions, 4-5.

4. The Commission recognizes that an administrative agency may change positions on an issue if the new position is supported by substantial competent evidence. When an administrative agency deviates from a policy it adopted earlier, it must explain the basis for the change. *Home Telephone Co. v. Kansas Corporation Comm'n*, 31 Kan. App. 2d 1002, 1012, 76 P.3d 1071 (2003), *rev. denied* 277 Kan. 923 (2004); *Western Resources, Inc. v. Kansas Corporation Comm'n*, 30 Kan. App. 2d 348, Syl. § 7, 42 P.3d 162, *rev. denied* 274 Kan. 1119 (2002). In this proceeding, because the Commission has decided not to change its position, the Commission is not required to explain why it has chosen to follow its prior decision. However, the Commission recognizes that the parties have expended much effort to fully develop this issue. Also, the issue bears directly upon the relationship and interaction between federal and state regulatory authorities regarding the funding of universal service. For these reasons, the Commission will discuss why it has declined to change its position.

5. The Commission has jurisdiction over this proceeding pursuant to Section 254(e) of the Federal Telecommunications Act, 47 U.S.C. § 254(e).

I. Background Information

6. In the Telecommunications Act of 1996, Congress sought to ensure that the nation's population would have access to "universal service." 47 U.S.C. § 254. The FCC was charged with implementing the Federal Act, which included developing policies to preserve and advance universal service principles. The Act defined universal service to include principles of quality telecommunications service at just, reasonable, and affordable rates; service available in all regions of the country; and services and rates in rural and high-cost areas comparable to other

areas. 47 U.S.C. § 254(b). To develop the services and infrastructure needed to meet these goals, a federal fund was created to which all telecommunications carriers contributed, often by passing fees on to customers. 47 U.S.C. § 254(d). This fund, referred to as the Federal Universal Service Fund or FUSF, is distributed to telecommunications carriers that apply for these public subsidies and that have been designated as ETCs. Only ETCs designated pursuant to 47 U.S.C. § 214(e) are eligible to receive FUSF support. 47 U.S.C. § 154(e).

7. When a carrier wants to obtain ETC designation for an area within a state, the state public utility commission, not the FCC, makes the designation.¹ Before making such a designation in an area served by a rural telephone company, the state commission must find that the designation "is in the public interest." 47 U.S.C. § 214(e)(2).

8. Once a carrier has been designated to receive FUSF support, the carrier must use that support "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 U.S.C. § 254(e); 47 C.F.R. § 54.7. Under FCC rules, for an ETC to receive FUSF support in Kansas, this Commission must annually certify that the carrier will use all federal high-cost support "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 C.F.R. §§ 54.313(a), 54.314(a).

9. Aside from FUSF support, the Kansas Legislature established a state universal service program. This universal service fund, known as the KUSF, distributes state subsidies for universal service after a carrier is designated as an eligible provider. The KUSF is administered separately from the FUSF. The issue involved in this proceeding does not involve KUSF support. Rebuttal Testimony of Mark D. Harper, filed May 18, 2007, pages 5-6 (Harper Reb., 5-6) (discussing interrelationship of high-cost FUSF support and KUSF support).

¹ In some circumstances, not relevant here, the FCC makes the designation of eligibility under 47 U.S.C. § 254. 47 U.S.C. § 254(e)(6).

10. Initially, to meet the FCC's requirement, under 47 C.F.R. §§ 54.313(a) and 54.314(a) to file certifications by October 1, 2002, this Commission approved self-certification forms in KCC Docket No. 01-GIMT-595-GIT (Docket 01-595), Order 4: Adopting Final Certification Form, filed August 20, 2002. To develop forms for comprehensive reporting of detailed information about how each ETC's expenditures and investments complied with the FCC's requirements, this Commission opened a general investigation to explore what procedures could be employed to meet the FCC's annual deadline to certify each carrier by October 1. Docket 05-112. Staff used a collaborative process, including an industry workshop, in developing a procedure for carriers to efficiently provide information needed by the Commission to make this certification. Direct Testimony of Janet Buchanan, filed May 4, 2007, page 6 (Buchanan Direct, 6). The Commission accepted Staff's Report on the USF Certification Process and asked the parties to comment. Docket No. 05-112, April 13, 2005 Order.

11. The Commission approved the procedure proposed by Staff and adopted the USF Certification Instructions for Cost Reporting (USF Instructions). Docket 05-112, July 21, 2005 Order. Using these procedures, an ETC provides this Commission with information about its expenditures and investments of FUSF support. Based upon a review of this information, this Commission can fulfill its requirement to certify to the FCC that each ETC has properly used high-cost FUSF support for the purposes for which this support was intended. Buchanan Dir., 7-8. This proceeding reexamines the Commission's decision regarding how CETCs report expenditures and investments in SWBT service areas in the USF Instructions. Buchanan Dir., 8-9. Except for this issue, the parties have agreed to the certification requirements adopted by the Commission.²

² In a separate proceeding, KCC Docket No. 06-GIMT-446-GIT, this Commission addressed its requirements for designating ETCs pursuant to the authority delegated to state commissions by 47 U.S.C. § 214(e)(2). Under this statute, state commissions must find a requesting carrier meets the requirements of 47 U.S.C. § 214(e)(1). In its Order Adopting Requirements for Designation of Eligible Telecommunications Carriers, issued October 2, 2006,

12. On July 27, 2006, this Commission opened a new docket for parties to file compliance information needed for the certification due October 1, 2006. KCC Docket No. 07-GIMT-025-GIT (Docket 07-025), Order Opening Docket, issued July 27, 2006 (July 27, 2006 Order). The Commission attached the USF Instructions to the Order Opening Docket as Attachment 6. July 27, 2006 Order, Attachment 6. Alltel filed a Petition for Reconsideration of that Order arguing that it should be able to use its high-cost FUSF support equally throughout its designated ETC area regardless of whether this area included SWBT service area. Alltel argued that the Commission's finding was a material limitation on its ability to invest funds in areas where the funds may be most needed to meet demand. In its Order Addressing Alltel's Petition for Reconsideration, issued on September 28, 2006, the Commission refused to change the procedures for the certification due October 1, 2006, but it directed that a new docket be opened to revisit the certification requirement contested by Alltel.

II. Proceedings in this Docket

13. On November 21, 2006, the Commission opened this docket to reexamine its prior decision regarding this certification requirement. Order Opening Docket, issued November 21, 2006 (November 21, 2006 Order), ¶ 6. In opening the docket, the Commission held that a list of questions recommended by Staff would be the focus of this general investigation, although parties were given an opportunity to include any additional questions or issues in their entries of appearance. November 21, 2006 Order, ¶¶ 7-8.

this Commission set forth factors it will consider in determining whether to grant a request to be designated an ETC. Sprint and Alltel sought reconsideration of the Commission's requirement that ETCs allow Lifeline customers to choose a calling plan and apply the Lifeline discount to the plan selected by customers. Alltel's challenge of this issue was dismissed in state district court on procedural grounds. *Alltel Kansas Limited Partnership LLP v. Kansas Corporation Commission*, Shawnee County, Kansas, District Court No. 06-C-1869, Memorandum Decision and Order, filed March 15, 2007. Sprint challenged this issue in the United States District Court for the District of Kansas. *Sprint Spectrum, O.P. v. Brian Moline, et al.*, Case No. 2007-CV-2130-KHV-JPO. This Court referred the matter to the FCC under the primary jurisdiction doctrine. Sprint filed a request for a Declaratory Ruling that is pending before the FCC in WC Dockets No. 03-109 and 07-138. Comments are due August 9, 2007.

14. The following parties filed entries of appearance in this docket: Cellular Network Partnership d/b/a Pioneer Cellular (Pioneer); Nex-Tech, Inc.; Nex-Tech Wireless, L.L.C.; State Independent Alliance (SIA); Sprint Spectrum L.P. (Sprint); ALLTEL Kansas Limited Partnership (Alltel); United Telephone Company of Kansas d/b/a Embarq, United Telephone Company of Eastern Kansas d/b/a Embarq, United Telephone Company of Southcentral Kansas d/b/a Embarq, Embarq Missouri, Inc. d/b/a United Telephone Company of Southeastern Kansas (collectively referred to as Embarq); USCOC of Nebraska/Kansas, dba U.S. Cellular, and RCC Minnesota, Inc. (referred to jointly as RCC MN and U.S. Cellular); and SWBT.

15. In its Order Scheduling Prehearing Conference, issued January 24, 2007 (January 24, 2007 Order), the Commission included Staff's questions and those posed by parties in a list totaling eleven questions. January 24, 2007 Order, ¶¶ 5-6. A prehearing conference was scheduled to discuss the procedure that would be used to address these questions. January 24, 2007 Order, ¶¶ 7-8. During a prehearing conference on February 13, 2007, parties agreed that questions numbered (1) and (8) listed in the January 24, 2007 Order presented legal issues that should be addressed in Prehearing Briefs. Transcript of Prehearing Conference, February 13, 2007, pages 14-19 (February Prehearing Tr., 14-19). In addition, Parties agreed upon a procedural schedule, which included an evidentiary hearing before the Commission beginning on June 4, 2007, and continuing as needed on June 5, 2007. Parties noted the Commission's final decision must be reached by early August 2007 to be implemented in the next round of annual reports to the FCC. February Prehearing Tr., 20. The Commission adopted the procedural schedule proposed by the parties. Order Setting Procedural Schedule, issued on March 6, 2007 (March 6, 2007 Order).

16. In compliance with the procedural schedule, the parties filed initial Prehearing Briefs on March 23, 2007 as follows: Staff, Alltel, Nex-Tech Wireless, SWBT, Embarq, Sprint,

and RCC MN and U.S. Cellular jointly. The parties filed Reply Prehearing Briefs on April 6, 2007, as follows: Staff, Alltel, SWBT, Sprint, and RCC MN and U.S. Cellular jointly. On April 10, 2007, RCC Minnesota and US Cellular filed a Notice of Errata to Reply Prehearing Brief.

17. The parties prefiled direct testimony on May 4, 2007, as follows: Janet Buchanan on behalf of Staff, Steve Mowery on behalf of Alltel, James E. Stidham, Jr., on behalf of SWBT, Chris Frentrup on behalf of Sprint, Mark D. Harper on behalf of Embarq, and Don J. Wood on behalf of U.S. Cellular and RCC MN. The parties prefiled rebuttal testimony on May 18, 2007, as follows: Janet Buchanan on behalf of Staff, Steve Mowery on behalf of Alltel, James Stidham, Jr., on behalf of SWBT, Mark D. Harper on behalf of Embarq, Chris Frentrup on behalf of Sprint, and Don J. Wood on behalf of RCC MN and U.S. Cellular.

18. The Commission conducted an evidentiary hearing on June 4, 2007. Entries of Appearance at the hearing were as follows: Colleen Harrell on behalf of Commission Staff and the public generally; Mark P. Johnson and David A. LaFuria on behalf of U.S. Cellular and RCC MN; John R. Wine and Sean R. Simpson on behalf of Alltel; Robert A. Fox on behalf of Pioneer Cellular; Diane Browning on behalf of Sprint; Mark E. Caplinger on behalf of SIA; Bruce A. Ney on behalf of SWBT; and Linda K. Gardner and Kevin K. Zarling on behalf of Embarq. Motions for Pro Hac Vice were granted for LaFuria, Simpson and Zarling. Transcript of Evidentiary Hearing, June 4, 2007, pages 6-7 (Tr., 6-7).

III. Findings of Fact

19. An administrative agency is required to set forth findings of fact in its Order to establish that its decision is based upon the evidence presented in the agency proceeding. An agency's decision must explain underlying facts contained in the record that support the findings, and it must be based exclusively upon evidence of record in the adjudicative proceeding and matters officially noticed in that proceeding. K.S.A 77-526(c), (d). The findings of the

Commission must be based upon facts that are stated in a manner that makes it possible for the reviewing court to measure the findings against the evidence from which they were educed. *Southwestern Bell Tel. Co. v. State Corporation Comm'n*, 192 Kan. 39, 47, 386 P.2d 515 (1963).

20. In this docket, the parties recognized at the prehearing conference that issues (1) and (8) listed in the January 24, 2007 Order presented questions of law because they require interpretation of FCC's rulings implementing FUSF support. The parties acknowledged the other nine issues involved mixed questions of law and fact or presented policy considerations. February Prehearing Tr., 7-19. Because the Commission has decided not to change its prior decision, the cases that require an agency to explain why its reasons for deviating from a prior position are inapplicable. *Home Telephone*, 31 Kan. App. 2d at 1012; *Western Resources*, 30 Kan. App. at 172. Given the nature of this proceeding reexamining a prior Commission decision, and because the issues addressed involve questions of law, mixed questions of law and fact, and policy considerations, a detailed list of factual findings separated from the analysis of the legal and policy issues is not practical. The facts stated above in paragraphs 1 to 18, as well as other express findings included within the discussion below, shall serve as factual findings supporting this decision. All facts referenced in this order are supported by specific citation to the administrative record in this proceeding and enable review of the substantial evidence in the record that supports the Commission's decision.

IV. Discussion of the Issue and Conclusions of Law

21. In reaching its decision, the Commission reviewed numerous FCC rulings that implement the Federal Act. Many of the FCC's decisions were made after it evaluated recommendations made by the Federal-State Joint Board on Universal Service (Joint Board). The Federal Act provided for joint boards, at the FCC's discretion, to address issues affecting particular states, issues that may affect intrastate rate structures, and issues related to

jurisdictional separations. 47 U.S.C. § 410. However, the Federal Act specifically required the FCC to establish a joint board to review and recommend changes to regulations necessary to implement the universal service provisions of the statute. 47 U.S.C. § 254(a)(1). The FCC established the Joint Board through an order in its CC Docket 96-45, which is its ongoing proceeding to investigate universal service. The Joint Board is comprised of three FCC Commissioners and four state commissioners nominated by the National Association of Regulatory Utility Commissioners (NARUC). 47 U.S.C. § 410(c). A Consumer Advocate nominated by the national association of consumer advocates also serves on the Joint Board. Typically, the FCC seeks comment from the public on recommendations of the Joint Board.

22. The FCC concluded that high-cost FUSF support must be available to all designated ETCs. *In the Matter of Federal-State Joint Board on Universal Service and In the Matter of Access Charge Reform*, CC Dockets 96-45 and 96-262, FCC 99-119, Seventh Report & Order and Thirteenth Order on Reconsideration in CC Docket 96-45, Fourth Report & Order in CC Docket 96-262, and Further Notice of Proposed Rulemaking, rel. May 28, 1999, at ¶ 72; 14 FCC Rcd 8078 (1999) (*Seventh Report & Order*, ¶ 72). One goal of the Federal Act was to remove implicit subsidies and, to the extent subsidies are employed, explicitly recognize the support being provided. Procedures used by the FCC to implement the FUSF explicitly recognize that carriers are using subsidies to cover the cost of providing universal service. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, FCC 97-157, Report and Order, rel. May 8, 1997, at ¶ 9; 12 FCC Rcd 8776 (1997) (*First Report & Order*, ¶ 9). In implementing the Federal Act, the FCC recognized that federal "high-cost support" under the universal service support framework provides "an explicit subsidy that flows to areas with demonstrated levels of costs above various national averages." *In the Matter of Federal-State*

Joint Board on Universal Service, CC Docket 96-45, FCC 05-46, Report and Order, rel. March 17, 2005, ¶ 55; 20 FCC Rcd 6371 (2005) (*2005 ETC Order*, ¶ 55).

23. When examining how this Commission would comply with the requirement of 47 C.F.R. § 54.313(a) to certify CETC use of FUSF support under 47 U.S.C. § 254(e), the Commission considered not only the need to make subsidies explicit but also the requirement of competitive neutrality, including the need to port FUSF support. This principle of competitive neutrality was developed by the Joint Board. In explaining this concept, the FCC stated: "Universal service support mechanisms and rules should be competitively neutral. In this context, competitive neutrality means that universal support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." *First Report & Order*, ¶ 47. The FCC concluded that competitive neutrality must be applied to both collection and distribution of FUSF support. *First Report & Order*, ¶ 48. The FCC clarified that competitive neutrality included the concept of technological neutrality to "allow the marketplace to direct the advancement of technology and all citizens to benefit from the development." *First Report & Order*, ¶ 49.³

24. To be consistent with the principle of competitive neutrality, both the Joint Board and the FCC determined that universal service support must be portable. *In the Matter of Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-45, FCC 00-248, Declaratory Ruling, rel. Aug. 10, 2000, at ¶¶ 12-13; 15 FCC Rcd 15168 (2000) (*Western Wireless Declaratory Ruling*, ¶¶ 12-13); *First Report & Order*, ¶ 286. The FCC concluded that if new entrants did not have the same opportunity to receive universal service

³ Recently, this Commission expressly adopted the FCC's statements defining the term competitive neutrality to apply to the Kansas concept of competitive neutrality related to the KUSF. KCC Docket No. 06-GIMT-1289-GIT, Order issued March 7, 2007, ¶ 20.

support as incumbent carriers, the new carriers "will be discouraged from providing service and competition in high-cost area." *Western Wireless Declaratory Ruling*, ¶ 23. The FCC indicated its belief that, by making support explicit and portable under the Federal Act, competitors would be increasingly able to compete for customers outside urban and business communities, assuring that support will be available to competitors that win higher cost customers from an incumbent carrier. *Seventh Report & Order*, ¶¶ 71-74.

25. All of these FCC principles were taken into account when the Commission addressed this issue. In adopting its USF Instructions, the Commission accepted several recommendations proposed by Staff regarding CETCs' expenditures and investments. This included Staff's recommendation regarding how the Commission should treat ETCs' expenditures and investments in SWBT's service areas. June 21, 2005 Order, ¶¶ 3-5. This issue arose because of the distribution mechanism used by the FCC to determine the high-cost FUSF support received by carriers.

26. Recognizing FUSF support is an explicit subsidy, the FCC developed a formula to determine those high cost areas "with demonstrated levels of costs above various national averages." *2005 ETC Order*, ¶ 55. Under the Federal Act, SWBT does not meet the definition of a rural telephone company, 47 U.S.C. § 153(37), and, therefore, is considered a non-rural carrier. Because it is a non-rural carrier, the FCC employed a hypothetical cost model to determine FUSF support for SWBT. 47 C.F.R. § 54.309. The high-cost model employed by the FCC determined that SWBT's cost of providing service did not reach the levels indicative of a need for support. Buchanan Dir., 17-19. Therefore, SWBT does not receive high-cost FUSF support for providing service in any of its Kansas exchanges. SWBT Initial Br., 4; Direct Testimony of James E. Stidham, Jr., filed May 7, 2007, p. 4 (Stidham Dir., 4). As a result, these areas do not receive FUSF support even though it is obvious to those familiar with Kansas

(including these commissioners) that some SWBT areas in this state are rural. Direct Testimony of Steve Mowery, filed May 4, 2007, p. 7 (Mowery Dir., 7); Direct Testimony of Don J. Wood, filed May 4, 2007, pp 13-14 (Wood Dir., 13-14); Rebuttal Testimony of Chris Frentrup, filing May 18, 2007, pp 4-7 (Frentrup Dir., 4-7).

27. Because SWBT does not receive high-cost FUSF support for serving its territory in Kansas, no FUSF support is ported to a carrier that wins a customer in a SWBT area, even if the customer is located in a SWBT area that otherwise would be considered rural. But if a CETC wins a customer in an area served by a rural carrier, the FUSF support will be ported to the CETC for serving that customer. The dilemma created arises from the definition of rural and non-rural carriers in the Federal Act and from FCC rules that determine how FUSF support is distributed among ETCs. Tr., 66-69 (Wood). SWBT's ability to receive FUSF support and, as a result, the ability to port FUSF support to CETCs serving customers in SWBT areas, results from the Federal Act and FCC rulings, not decisions of this Commission.

28. The Commission declined to certify that a CETC is using high-cost FUSF support appropriately under 47 U.S.C. § 254(e) if the CETC received FUSF support for serving a customer in a supported area served by a rural telephone company, but expended and invested that FUSF support in an area served by SWBT, which does not receive support. Yet CETCs have argued that their service area within a state is seen as one territory. The Commission has responded by accepting Staff's proposal allowing a CETC to certify expenditures and investments in a non-supported area if it can justify an allocation of a portion of expenditures and investments of FUSF support to serve a supported area. USF Instructions, 4-5. For example, if a CETC builds a cell tower in a non-supported area but can demonstrate that 60% of its use is by its customers in a supported area, then the Commission will certify that 60% of the CETC's

expenditures and investments for that tower are properly expended FUSF support. Buchanan Dir., 19-20.

29. In reaching its decision, the Commission finds it significant that no high-cost FUSF support is available to SWBT or a CETC serving a SWBT service area, regardless of the rural nature of the area served. Applying the principles adopted by the FCC, the Commission finds it would be inconsistent with the principle of competitive neutrality to allow a CETC to use FUSF support received for serving a supported area to justify investments and other expenditures in non-supported service areas. Buchanan Dir., 14. As a result, this Commission concludes that, even in SWBT areas that otherwise appear to be rural, the concept of competitive neutrality does not allow the Commission to certify that FUSF high-cost support expended in a SWBT study area is an appropriate use of FUSF high-cost support. Docket 05-112, April 13, 2005 Order, ¶ 9. The Commission will allow a CETC to allocate expenditures and investments made in SWBT service areas "for the provision, maintenance, and upgrading of facilities and services for which the support is intended" under 47 U.S.C. § 254(e) to the extent the CETC can justify the allocation to the Commission. USF Instructions, 4-5.

V. Arguments of the Parties

30. The Commission has set forth the reasons for its decision. In pleadings, the parties presented several arguments contesting this decision. The Commission was not persuaded by these arguments, but it will briefly address these challenges. To the extent the Commission fails to address a specific challenge to our ruling that is raised by a party, that argument is denied.

A. Parties challenge the Commission's authority to decide this issue.

31. Several parties questioned the authority of this Commission to restrict a CETC's ability to use FUSF support received from a supported area in a non-supported area, as long as

the CETC's expenditure is within the CETC's designated area. These parties argued the FCC's decisions regarding use of FUSF funds have permitted flexible use of high-cost support if the funds are used to provide supported services and to maintain or upgrade facilities used to provide such services. Nex-Tech Wireless argued that only the Joint Board and FCC have jurisdiction to impose additional restrictions on use of FUSF support. Nex-Tech Wireless Initial Br., 3-4. Therefore, Nex-Tech Wireless claimed the primary jurisdiction doctrine prohibited the Commission from adopting its decision, which Nex-Tech Wireless described as "an overly restrictive constraint on the use of FUSF high-cost support[.]" Nex-Tech Wireless Initial Br., 3-4.

32. Sprint argued the Commission has no authority to restrict use of FUSF support to particular geographic areas. Sprint Initial Br., 7-8. Sprint asserted nothing in the FCC's rules allows a state commission to direct how an ETC will allocate or use FUSF support within its designated service area, "as long as the carrier uses the facilities to provide services designated for support . . . within the service area." Sprint Initial Br., 7 and n. 5, *quoting* 47 C.F.R. § 54.201(g). In addition, Sprint argued that 47 U.S.C. § 254(e) authorizes an ETC to utilize FUSF support to provide supported services anywhere within its designated geographic service area, while 47 U.S.C. § 254(f) prohibits a state from adopting a rule that burdens FUSF support mechanisms. Sprint Initial Br., 10-11. When the provisions of the Federal Act are read together, Sprint argued the Commission's decision cannot stand. Alltel took a similar position, arguing that prohibiting investment throughout a CETC's entire service area contradicts the Federal Act, *citing* 47 U.S.C. §§ 214 and 254(b)(3). Alltel Reply Br., 5-6.

33. RCC MN and U.S. Cellular cited several statutes to support the assertion that the Commission lacked legal authority to prohibit a CETC from using FUSF support in rural areas within its designated ETC service area. RCC NM and U.S. Cellular stated that the Commission's decision (1) would not allow a CETC to offer and advertise services supported by FUSF support

throughout its designated ETC service area, 47 U.S.C. § 214(e)(1); (2) would prohibit preserving or advancing universal service by prohibiting a CETC from investing support in a rural area, 47 U.S.C. § 254(f); (3) would run afoul of 47 U.S.C. § 253(a), which prohibits a state from prohibiting the ability of an entity "to provide any interstate or intrastate telecommunications service"; and (4) would violate the principle of competitive neutrality, 47 U.S.C. § 253(b), because the incumbent local exchange carrier, i.e. SWBT, constructed and operated its network over decades of implicit or explicit support but a CETC, such as RCC MN or U.S. Cellular, is prohibited from investing FUSF support needed to provide service. RCC MN & U.S. Cellular Initial Br., 3-5, 14-15. RCC MN and U.S. Cellular argued that the restriction imposed by the Commission's decision would violate competitive neutrality because it would only exacerbate SWBT's artificial competitive advantage because its network was built using implicit state and federal subsidies. RCC MN & U.S. Cellular Post-Hearing Br., 21-25. RCC MN and U.S. Cellular asserted that the FCC has not interpreted the Federal Act in this manner and, therefore, this Commission's interpretation prohibits FUSF expenditures contrary to the FCC's rulings. RCC MN & U.S. Cellular Post-Hearing Br., 4-9.

34. The Commission rejects arguments that it has no authority to decide what procedures it will use in fulfilling its role of certifying to the FCC that FUSF support was properly expended and invested by CETCs operating in Kansas. 47 C.F.R. § 54.313. In adopting its USF Instructions, the Commission has provided a mechanism to comply with the mandate of the Federal Act, which requires a carrier to use FUSF support "only for the provision, maintenance, and upgrading of facilities and service for which the support is intended." 47 U.S.C. § 254(e). The Commission adopted the USF Instructions after considering principles set forth by the FCC. Repeatedly the FCC has recognized that state commissions play an important role in deciding how to distribute FUSF subsidies among ETCs. *2005 USF Order*, ¶ 8.

35. For example, the FCC has acknowledged that state commissions have "the primary responsibility for performing ETC designations" that result in carriers being eligible for FUSF subsidies. *2005 USF Order*, ¶ 8. The FCC established standards for ETC designation and encouraged state commissions to adopt the same requirements, but it did not require states to adopt them. Instead, the FCC recognized that state commissions exercise discretion in imposing additional eligibility requirements on carriers seeking ETC designation. *2005 USF Order*, ¶ 61. Similarly, the FCC recognized that states' authority to make ETC designations applies to wireless carriers that seek FUSF subsidies. The FCC has held that state commissions may extend generally applicable, competitively neutral requirements to wireless carriers if the requirements do not regulate rates or entry and are consistent with sections 214 and 254 of the Federal Act. *2005 USF Order*, ¶ 31

36. The FCC's recognition of the role state commissions play in deciding issues under the Federal Act has been upheld in court. In *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 418 (5th Cir. 1999), the Court expressly held that the Federal Act permits states to impose additional eligibility requirements on carriers seeking an ETC designation. The Commission concludes that the FCC's willingness to allow state commissions to exercise discretion in deciding issues related to administering FUSF subsidies includes the decision reached by this Commission regarding certification of CETCs' use of FUSF support under 47 C.F.R. § 54.313. The FCC relies upon state commissions to evaluate the CETCs' expenditures and investments to be sure FUSF support is used only for the reasons intended as reflected in 47 U.S.C. § 254(e). Under the Federal Act and FCC rules, this Commission has authority to decide the issue addressed herein and to implement its decision through requirements set forth in its USF Instructions.

B. CETCs are required to provide service throughout their designated service area.

37. Alltel argued CETCs have an independent obligation to use FUSF support to offer supported services throughout their entire designated service area, which in Kansas includes SWBT areas and areas served by various rural telephone companies. Mowery Dir., 9. Thus, regardless of the support received by an incumbent carrier, Alltel asserted a CETC must offer services supported by FUSF support mechanisms "throughout the service area for which designation is received." Alltel Initial Br., 3, *quoting* 47 U.S.C. § 214(e) and *citing* 47 C.F.R. § 54.202(a)(1)(i); Alltel Reply Br., 3-5. A CETC's service area is a geographic area established by a state commission for the purpose of determining universal service obligations and support mechanisms. 47 U.S.C. § 214(e)(5); 47 C.F.R. § 54.207. Alltel stated that, because of federally created boundaries for wireless spectrum licensing, the established "service area" for wireless CETCs typically encompasses multiple incumbent study areas. Alltel Initial Br., 3-4. Therefore, Alltel argued a CETC's investment in facilities that are located within an SWBT area is appropriate if those facilities are within the CETC's individually designated service area. Alltel Initial Br., 4; Rebuttal Testimony of Steve Mowery, filed May 18, 2007, pages 3-5 (Mowery Reb., 3-5). Also, Alltel claimed CETCs demonstrate their commitment to using FUSF support to alleviate poor service quality through meeting requirements of the FCC's five-year service improvement plan that CETCs must file. Alltel Post-Hearing Br., 7, *citing* 2005 ETC Order.

38. Sprint similarly argued it is designated to receive FUSF support for a geographic service area that includes SWBT and rural telephone company service areas. Arguing that it serves a single service area in Kansas, Sprint noted that the Universal Service Administrative Company (USAC) assigned a single service area code corresponding to Sprint's geographic service area, as defined by the Commission's ETC designation orders. Sprint Initial Br. 4; Direct Testimony of Chris Frentrup, filed May 4, 2007, pages 3-4 (Frentrup Dir., 3-4). As a designated

ETC, Sprint is obligated to offer and advertise supported services throughout a geographic service area defined by the designating authority. Typically this service area is defined by reference to geographic boundaries of an incumbent carrier's wire centers or an entire study area, but the service area is rarely coterminous with an incumbent carrier's certificated study area. Sprint Initial Br., 5-7; Sprint Reply Br., 3. Complying with requirements set forth in its 2005 *USF Order*, ¶ 30, Sprint asserted the FCC approved Sprint's five-year service improvement plan describing how Sprint proposed to use high-cost support to improve and expand its network service within its designated service area. Sprint Initial Br., 9.

39. RCC MN and U.S. Cellular asserted that a CETC is designated to serve a single area, not multiple incumbent-specific service areas, and that it must offer and advertise supported services to this single area. Wood Dir., 7. RCC MN and U.S. Cellular argued a CETC should be allowed to use its FUSF support throughout its designated service area. RCC MN & U.S. Cellular Initial Br. 8-10; RCC MN & U.S. Cellular Post Hearing Br, 14. RCC MN and U.S. Cellular claimed the FCC recognized that CETCs incur costs in a different way than incumbent carriers, noting an area that is high-cost for an incumbent may be low-cost for a CETC. RCC MN & U.S. Cellular, Initial Br., 10-11; Wood Dir., 19; Tr., 65-66 (Wood). In order not to discourage competition, the FCC held that CETCs should receive "portable" support based on what incumbents receive on a per-line basis instead of basing high-cost support for CETCs on their costs of provisioning service. *First Report and Order*, ¶ 287. RCC MN and U.S. Cellular stated the FCC refused to clarify that high-cost support must be used in wire centers targeted as recipients of FUSF support because the FCC found such a restriction would be inconsistent with the role of state commissions in determining how to use USF support to advance goals of universal service. RCC MN & U.S. Cellular, Initial Br., 7, n. 9.

40. Nex-Tech Wireless expressed concern that an ETC may have difficulty segregating its use of FUSF support between rural and non-rural areas where common facilities provide supported services to both areas. For example, Nex-Tech Wireless noted the problems with segregating expenditure of FUSF support to maintain and upgrade a switch used to serve both high-cost and non-high-cost markets. Nex-Tech Wireless Initial Br., 6. Nex-Tech Wireless further noted that a primary goal for wireless carriers in designing networks is to provide the best possible coverage in light of a limited number of locations available for placing antennas and associated infrastructure. Thus, a wireless carrier will seek to place an antenna in a location that provides the best signal propagation characteristics in a given geographic area, without determining whether a signal stays within specific exchange or service area boundaries. Nex-Tech Wireless Initial Br., 6-7.

41. As the parties have noted in their arguments, the FCC has discussed factors to be taken into account when designating ETCs and reviewing what information should be reported concerning the receipt and expenditure of FUSF support. In deciding whether to grant a specific carrier's request to be designated an ETC, the Commission takes many factors into account, including those discussed by the FCC. One issue that must be decided when a carrier asks the Commission to designate it an ETC is the geographic area to be served. The CETC sets out the area it wishes to serve and asks the Commission to approve the area identified. As Staff noted, the CETC is not required to include SWBT service areas within its territory. Rebuttal Testimony of Janet Buchanan, May 18, 2007, page 15 (Buchanan Reb., 15). In approving identified areas, the Commission must assume that the carrier requesting ETC designation, as part of its business model, has considered and taken into account whether the areas of incumbent carriers underlying its proposed service area has been served by rural or non-rural carriers as determined by the FCC.

42. The Commission's decision is based on the principle of competitive neutrality. The concept of competitive neutrality minimizes disparities to prevent an entity from receiving an unfair competitive advantage that might skew the marketplace or inhibit competition. *First Report & Order*, ¶ 48. The FCC recognized that, through competitively neutral porting of support, all carriers are allowed to "receive comparable support for performing comparable functions." *First Report & Order*, ¶ 144. Under the FCC's high-cost model, no support is available to port to carriers in SWBT areas. The Commission declines to permit a carrier to use high-cost support, which is received for serving customers in an area where the incumbent ETC receives FUSF support, to invest in service areas that the FCC has deemed do not qualify for FUSF support. To do so would violate the principle of competitive neutrality. Staff suggested that those CETCs arguing the FCC's high-cost model does not accurately reflect the cost of providing universal service in SWBT's areas should ask the FCC to modify its high-cost model. *Buchanan Reb.*, 7-8. The FCC, not this Commission, is the proper forum for deciding this issue, which is directly related to the FCC's high-cost model.

C. Similarly situated customers will be treated differently.

43. Sprint urged the Commission to reject its prior decision as bad public policy, arguing that similarly situated consumers will be disadvantaged based upon the identity of the incumbent serving the applicable wire center. Sprint pointed out that each customer served by a CETC pays into the FUSF, but it argued the Commission's decision limits a carrier's ability to reinvest available FUSF support in those same areas. Sprint pointed out that similarly situated consumers in neighboring wire centers will be treated differently depending upon whether the customer is served by a rural incumbent carrier or SWBT. *Sprint Post-Hearing Br.*, 7; *Frentrup Reb.*, 2-3. Sprint also cautioned that restricting the expenditure and investment of FUSF support to areas of rural incumbents can inevitably result in inefficient network buildout and diminished

service quality that may negatively affect the deployment of competitive services in rural or high-cost areas. Sprint Post-Hearing Br., 8-10.

44. Alltel asserted that the Commission's decision will harm Kansas consumers because investment of FUSF support in unquestionably rural areas of Kansas served by SWBT will be foreclosed. Alltel argued that its inability to invest FUSF support to develop and enhance its wireless network in SWBT areas will impact the quality of life, economic development opportunities, and health and safety of those Kansas communications in SWBT areas. Alltel Post-Hearing Br., 9-11; Mowery Dir., 7-8, 10-13; Mowery Reb., 3-5.

45. RCC MN and U.S. Cellular asserted the Commission has confused the CETCs' receipt of FUSF support under 47 C.F.R. 54.307 with rules governing the expenditure of support under 47 C.F.R. § 54.313, which leads to an absurd result that harms rural consumers, who are the focus of universal service policy. RCC MN & U.S. Cellular Reply, 10-12. RCC MN and U.S. Cellular asserted it was clear that a restriction on the ability of a CETC to invest FUSF support in rural areas served by SWBT would harm consumers in those areas. RCC MN and U.S. Cellular argued that consumers in one rural area should not be treated differently simply because of the identity of the underlying incumbent carrier. RCC MN & U.S. Cellular, Post-hearing Br., 19-20; Rebuttal Testimony of Don J. Wood, filed May 18, 2007, page 28 (Wood Reb., 28).

46. Regarding the treatment of consumers in rural areas, Staff pointed out that the FCC has interpreted the provisions of 47 U.S.C. § 254(b)(3), requiring that consumers throughout the nation have access to telecommunications and information services. Staff Post-Hearing Br., 5-6. The FCC has determined what areas are considered rural, insular, and high cost, which makes them eligible for high cost model support. Also, the FCC developed a forward-looking cost model for high-cost areas, *First Report & Order*, ¶¶ 214, 224, and a

forward-looking cost model for non-rural carriers. *Seventh Report & Order*, ¶¶ 61-62. In developing a cost-based benchmark for non-rural carriers, the FCC expressed its view that "the use of forward-looking economic cost will lead to support mechanisms that will ensure that universal support corresponds to the cost of providing the supported services, and thus, will preserve and advance universal service and encourage efficiency[.]" *First Report & Order*, ¶ 225.

47. The Commission must always balance competing interests when deciding an issue. Here, the issue is before this Commission due to an act of Congress. The CETCs argue that rural consumers of Kansas will be harmed if the Commission does not change its position regarding certification of how ETCs use FUSF support in the state. The Commission disagrees with this argument. The Commission does not control the amount of high-cost FUSF support available for expenditure and investment in rural areas of Kansas. In addressing the issue it does have authority to decide, the Commission is aware that the FCC has determined which "areas with demonstrated levels of costs above various national averages" are entitled to the explicit subsidy flowing from high-cost support. *2005 ETC Order*, ¶ 55. This Commission has followed the FCC's rulings and, as a result, concludes that a CETC receiving this high-cost model support must expend and invest that support in the area the FCC has determined is entitled to receive it due to the high cost to provide service there. *2005 ETC Order*, ¶ 77.

48. Before leaving this issue, the Commission acknowledges the CETCs have raised important concerns regarding distribution of FUSF support in rural areas such as Kansas. Sprint aptly described this problem of what appears to be disparate treatment of customers in neighboring rural wire centers in Kansas when it argued that customers will be treated differently not because these "wire centers are any more rural or high-cost to serve [but] simply because the FCC's rural [incumbent] funding mechanisms operate differently." Sprint Post-Hearing Br., 7-8.

However, to take Sprint's point, the problem arises from the *FCC's funding mechanism* for high-cost support, not from decisions by this Commission. *Buchanan Reb.*, 8-10. The parties should present their concerns to the FCC, which, in conjunction with the Joint Board, has authority to address this issue.

D. No other state restricts use of FUSF support in this way.

49. The parties have pointed the Commission to decisions by other state commissions relating to the issue in this docket. For example, *RCC MN and U.S. Cellular* argued that the Vermont commission decided that a CETC is not restricted to spending FUSF support in the specific area that generated the support. *RCC MN & U.S. Cellular Post-Hearing Br.*, 14-15, *quoting RCC Atlantic, Inc.*, Docket No. 6934, issued Sept. 29, 2004, by VT Pub. Serv. Bd, pp 52-53. This Commission made a similar ruling when it was initially determining reporting requirements under Section 254(e). In its July 21, 2005, Order in Docket 05-112, the Commission stated: "The Commission finds that it should not require reporting by CETCs by [rural telephone company] study area; however, the Commission finds that it should require proof that all ETCs spend USF funding within supported areas to provide universal service." July 21, 2005 Order, ¶ 9.

50. *RCC MN and U.S. Cellular*, as well as *Alltel and Sprint*, urge the Commission to follow a recent decision by the Missouri Public Utility Commission, which found nothing in the federal or state law to prevent *U.S. Cellular* from spending USF support in rural wire centers served by AT&T Missouri. *RCC MN & U.S. Cellular Post-Hearing Br.*, 19; *Alltel Post-Hearing Br.*, 7-9; *Sprint Post-hearing Br.*, 10-12. These parties argue that the Missouri Commission's decision addressed the same issue that is now before this Commission. In announcing its decision, the Missouri Commission stated that it did not need "to finally decide in this application case the propriety of the details of *U.S. Cellular's* expenditures of USF support. That

process will occur later, when the Commission examines those expenditures in detail during the annual recertification process." Sprint Post-Hearing Br., 11, quoting *In the Matter of the Application of USCOC of Greater Missouri, LLC for Designation as an Eligible Telecommunications Carrier Pursuant to the Telecommunications Act of 1996*, Case No. TO-2005-0384, *Report and Order*, p. 29 (MO PSC, May 13, 2007). SWBT's witness pointed out that members of the Missouri Commission were divided by a 3 to 2 vote. Stidham Dir., 6.

51. A decision by another state's public utility commission is not binding on this Commission. With due respect to the majority of the Missouri Commission, this Commission declines to follow the decision in its May 13, 2007 Report and Order. In adopting the Federal Act, Congress could have eliminated the role of state utility commissions, or it could have relegated their authority exclusively to intrastate services. It did neither. Instead, Congress provided for participation by state commissions in certifying carriers as eligible to receive FUSF support, 47 U.S.C. § 214, and in administering universal service support. 47 U.S.C. § 254. The FCC affirmed state commission authority under Sections 214 and 254 in its recent *2005 ETC Order*, in which the FCC set forth factors it will consider in situations when it must determine whether a carrier qualifies to be designated an ETC. In this Order, the FCC urged, but it explicitly did not require, state commissions to consider the same factors. *2005 ETC Order*, ¶ 19. In recognizing the authority of state commissions to impose requirements on an ETC different than those adopted in its *2005 ETC Order*, the FCC acknowledged that state commissions will weigh factors differently determining issues involved FUSF support. This individual consideration is particularly true when taking local considerations into account. *2005 ETC Order*, ¶¶ 30-31. This Commission is not compelled to follow the decision of the Missouri Public Service Commission on this issue.

E. Other Issues

52. In discussing the issue presented, Staff referred to an FCC decision regarding use of FUSF support in areas affected by Hurricane Katrina. Staff Initial Br., 8-9; Staff Reply Br., 6-8; Staff Post-hearing Br., 3-4. Several parties criticized Staff's characterization of this FCC decision. RCC MN & U.S. Cellular Reply Br., 17; RCC MN & U.S. Cellular Post-Hearing Br., 16; Alltel Reply Br., 6; Sprint Reply Br., 6-7. Staff cited this FCC ruling for illustrative purposes. In any event, the Commission did not rely upon this Order, instead finding other FCC Orders more helpful in analyzing the issue at hand, as indicated by the citations contained herein.

53. RCC MN and U.S. Cellular, in addition to Sprint, argued that it was not true that SWBT does not receive FUSF support. These parties pointed to Interstate Access Support (IAS), which is explicit universal service high-cost support that has been removed from carrier access charges. RCC MN & U.S. Cellular Initial Br., 5-6; RCC MN & U.S. Cellular Reply Br., 6-7; Sprint Post-hearing Br., 5-6; Frentrup Reb., 3. RCC MN and U.S. Cellular acknowledged that they receive the same "per-line" IAS as SWBT for serving these rural wire centers. RCC MN & U.S. Cellular Initial Br., 6, *citing* 47 C.F.R. § 54.307(a)(1); Wood Dir., 18. Staff's witness confirmed that SWBT received IAS, which was designed to replace implicit support carriers received through interstate access charges. Buchanan Reb., 5-6. IAS is ported to CETCs on a per-line basis in service areas of SWBT and Embarq; ETCs must certify use of IAS directly to the FCC, not to this Commission. Buchanan Reb., 6. The focus of this docket is the certification procedure used by this Commission to certify proper use of high-cost FUSF as required by 47 C.F.R. § 54.313(a); Tr., 37-38 (Wood). The availability of IAS is not relevant to certification requirements being addressed in this docket.

VI. Suggested Alternatives and Conclusion

54. As an alternative solution, Sprint urged the Commission to evaluate each carrier's annual service improvement plan on a case-by-case basis to ensure that all FUSF support is being used only for the "provision, maintenance, and upgrading of facilities and services for which the support is intended" under 47 U.S.C. § 254(e). Sprint Post-Hearing Br. 3. Sprint proposed that, upon further inquiry, the Commission develop a list of SWBT wire centers to be presumptively deemed rural or high-cost areas. Using such a list, Sprint suggested a CETC's proposed investment in a SWBT wire center on the list be deemed *prima facie* evidence of an appropriate use of FUSF support under Section 254(e); alternatively, if a CETC proposed to invest FUSF support in a SWBT wire center not on the list, the carrier would have the burden to demonstrate its investment is necessary to serve an area of high-cost for the carrier. Sprint Post-Hearing Br., 3, 12-13. While the Commission appreciates Sprint's effort to address problems with the FCC's high-cost support mechanism, the Commission concludes that this approach is focused on the FCC's findings defining carriers as "rural" and "non-rural" and, therefore, the FCC must be the appropriate venue for consideration of this matter. Absent a FCC determination changing the ability of SWBT to recover a high-cost subsidy, this proposal does not satisfy the principle of competitive neutrality. Also, it seems to be a prescription for extensive litigation. First, no matter who has the burden of proof, Sprint's suggestion runs afoul of its own argument that we do not have authority to make adjustments to its expenditure certification so long as expenditures are made within an ETC's designated area. Second, it invites litigation over the choice of the presumptively high-cost wire centers and, third, over any denial of certification for expenditures in areas outside those wire centers presumed to be high-cost.

55. Alltel urged the Commission to use the required two-year service improvement plan to evaluate whether a carrier has demonstrated that its USF support will be spent to expand its network in its designated service area. Alltel asserted that, by evaluating improvements proposed in this plan, the Commission will be able to determine (1) how signal quality, coverage, or capacity will improve; (2) the start and completion date for each project using FUSF support; (3) the geographic areas where improvements will be made; (4) the population that will be served by the improvements. Alltel Post-Hearing Br., 6. The Commission appreciates Alltel's proposal and will be assessing these factors insofar as they relate to expenditures that provide service in supported areas. But, again, this does not remedy the problem that using the subsidy to support services in non-supported areas still violates the principle of competitive neutrality.

56. Although characteristics of "rural" exchanges served by a "non-rural" carrier such as SWBT may be similar to areas served by "rural" carriers, the FCC has made a distinction and implemented a federal policy based on that distinction. We would agree that a fair response to this issue would be a FCC determination to treat all carriers that serve rural areas the same, and to ensure that, as the dissent notes, those funds go to an area based on the geography, population density and other factors that go into the cost of serving that area, as opposed to making a distinction based on the carrier that is providing the service. Moreover, were this Commission to allow the certification of expenditures in all of the areas served by CETCs under current rules, this still would not result in a policy that limits expenditures to high-cost areas. Indeed CETCs would then be able to certify expenditures in areas served by SWBT that are decidedly "non-rural" in character – large towns served by several competing carriers. For the reasons stated above, the parties' suggestion that this Commission could control such spending through the annual certification process by revoking designation of the ETC designation of carriers reporting expenditures in metropolitan areas is untenable. Tr., 44-45 (Wood). We prefer a ruling that

gives carriers guidance before expenditures and investments are made. Unless and until the FCC changes its policy, it seems to us that focusing universal service support on rural areas that the FCC has determined are eligible for support is the fair and equitable approach to meeting universal service goals.

57. On July 31, 2007, the Commission opened a docket for the purpose of receiving certifications to ensure compliance with 47 U.S.C. § 254(3) for the October 1, 2007, deadline. KCC Docket No. 08-GIMT-125-GIT, Order Opening Docket and Assessing Costs, issued July 31, 2007 (July 31, 2007 Order). Forms and the USF Instructions were attached to the July 31, 2007 Order; carriers must file their information by the close of business on Friday, August 24, 2007. The decision in this proceeding does not change the previously adopted method requiring CETCs to exclude expenses and investments for SWBT exchanges when justifying FUSF support. July 31, 2007 Order, ¶ 6. Therefore, even if a party seeks reconsideration of this Order, carriers must comply with the requirements of the July 31, 2007 Order by providing information required in the Commission's USF Instructions and attached forms.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

(A) The Commission declines to review its prior decision that refused to certify CETCs' expenditures and investments in non-supported areas, which are areas served by SWBT, except to the extent CETCs can establish allocation of expenditures and investments to supported areas, as set forth above.

(B) A party has fifteen days, plus three days if service is by mail, from the date of service of this Order in which to petition the Commission for reconsideration of any agency action taken herein. K.S.A. 66-118b; K.S.A. 2006 Supp. 77-529(a)(1).

(C) The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further order or orders, as it may deem necessary.

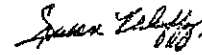
BY THE COMMISSION IT IS SO ORDERED.

Wright, Chmn; Krehbiel, Com., dissenting; Moffet, Com.

Dated: AUG 09 2007

ORDER MAILED

AUG 10 2007

 Executive
Director

Susan K. Duffy
Executive Director

mjc

AUG 09 2007

Docket No. 07-GIMT-498-GIT


Commissioner Krehbiel, dissenting:

I dissent because I do not believe Congress intended the result reached by the majority. In adopting the Federal Act, Congress sought to promote universal service throughout the nation. Universal service includes quality telecommunications service at just, reasonable, and affordable rates in all regions of the country. 47 U.S.C. § 254(b). The Federal universal service fund (FUSF) was created to be sure services and rates for universal service in rural and high-cost areas would be comparable to services and rates available in other areas that were more urban and less costly. 47 U.S.C. § 254(d). Once a carrier has met qualifications required to be designated an ETC, 47 U.S.C. § 214(e), the fund should be available to assist these carriers in developing services and infrastructure in rural and high-cost areas.

To the extent this Commission's decision is required by FCC rulings, as suggested by the majority, I believe the Federal Act has been interpreted in a manner contrary to Congress' intent to ensure universal service and its reason for providing the FUSF. The FCC's method of determining whether a particular area should be considered rural or non-rural is fatally flawed. Instead of relying upon a hypothetical benchmark, this decision should be based on individual characteristics of a geographic area and the needs of consumers being served. The Commission's prior decision in KCC Docket No. 05-GIMT-112-GIT was made following workshops with the industry and comments by the parties. Here, briefs of Alltel, Sprint, and RCC MN and U.S. Cellular, in conjunction with testimony by all parties' witnesses, have clarified for me that the manner in which

rural and non-rural areas are determined must be addressed to assure the purpose of the FUSF is fulfilled and the goals of the Federal Act are met.

I read provisions of the Federal Act and language of the FCC's implementing rules to allow this Commission to certify that an ETC's expenditures and investments in areas considered non-rural pursuant to the FCC's high-cost mechanism are being used "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended," 47 C.F.R. § 54.313(a), as long as the ETC demonstrates that the expenditures and investments are made to serve its customers within its approved territory. In my view, the majority's refusal to certify ETCs' expenditures and investments to serve customers in admittedly rural areas of Kansas, which happen to be located in SWBT territory, turns the rationale for creating the FUSF on its head and is poor public policy. Therefore, I cannot agree with the decision of the majority and must dissent.


Robert E. Krehbiel, Commissioner